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Supreme Court of the United States

OCTOBER TERM, 1964

No. 152

AMPCO PRINTING-ADVERTISERS' OFFSET CORP., THE KATZ PARKING SYSTEM, INC. and THE GEORGIAN PRESS, INC.,
Plaintiffs-Appellants,

against

THE CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, ABRAHAM D. BEAME, as Comptroller of said City, and HILDA G. SCHWARTZ, as Director of Finance of said City,
Defendants-Respondents,

LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York,
Intervenor-Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 1185

AMPCO PRINTING-ADVERTISERS' OFFSET CORP., THE KATZ PARKING SYSTEM, INC. and THE GEORGIAN PRESS, INC.,

Plaintiffs-Appellants,

against

THE CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, ABRAHAM D. BEAME, as Comptroller of said City, and HILDA G. SCHWARTZ, as Director of Finance of said City,

Defendants-Respondents,

LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York,

Intervenor-Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

Preliminary Statement

The appellants have appealed from a judgment of the Court of Appeals of the State of New York, dated February 20, 1964, unanimously affirming a judgment of the Supreme Court of the State of New York.

The opinion of the Court of Appeals is officially reported in 14 NY 2d 14 and is set forth in Appendix A of the ap-

pellants' jurisdictional statement. The opinion of the Supreme Court is officially reported in 41 Misc 2d 371 and is set forth in the same Appendix A.

By this appeal the appellants challenge the constitutionality of the local law imposing the New York City Commercial Rent or Occupancy Tax and of the New York State enabling act pursuant to which it was adopted. The appellants contend that these laws violate Section One of the Fourteenth Amendment in that, in three different respects, the laws discriminate against the appellants arbitrarily and capriciously.

The appellees, other than the Intervenor, move to dismiss the appeal on the ground that it does not present a substantial federal question.

Statutes Involved

The statute authorizing the local tax law and the local law imposing the tax are set forth in Appendix C of appellants' jurisdictional statement.

Statement of the Case

This is an action brought by the appellants for a declaratory judgment declaring that the State enabling act and the local law imposing the New York City Commercial Rent or Occupancy Tax are unconstitutional and invalid on the ground that they violate several provisions of the New York State Constitution and Section One of the Fourteenth Amendment of the Federal Constitution. After issue was joined, both sides moved for summary judgment.

The trial court denied appellants' motion, granted appellees' motion, and declared that both the enabling act and

the local law were valid and constitutional. Upon a direct appeal the New York Court of Appeals unanimously affirmed. Both courts wrote opinions.

Facts

(1)

The complaint alleges, so far as relevant, that: The appellant Ampco Printing-Advertisers' Offset Corp. is engaged in the color lithography and printing business on leased premises in New York City and pays rent in excess of $2500 per annum; and that it competes with other persons in the same business who own the premises they use for such activity. The appellant Katz Parking System, Inc., operates a public parking business in the City on premises in the City for which it pays rent in excess of $2500 per annum; and it competes with other persons who own the premises they use for such activity and with the City of New York. The appellant Georgian Press, Inc., is the owner of premises in the City which it rents to commercial tenants, all of whom pay rent in excess of $2500 per annum.

The affidavits in support of appellants' motion for summary judgment reiterate these factual allegations. They are not disputed in the affidavit supporting the appellees' motion for summary judgment.

The complaint contains an allegation that the enabling act and the local law violate the Fourteenth Amendment, Section One, in that they arbitrarily, capriciously, unreasonably and wrongfully discriminate against the appellants and others similarly situated in that they are taxed at the rate of 5% of their rent while: (1) the City of New York and others engaged in the same commercial activity who

own the premises used for such activity are not subject to the tax; (2) other tenants who are subject to the tax, but who have a base rent not in excess of $2,500 per annum, are taxed at the rate of 2½% of the rent; and (3) tenants who rent for residential purposes are not subject to the tax.

(2)

In the trial court the appellants' memorandum of law urged all three grounds of asserted discrimination. In the New York Court of Appeals the appellants' brief confined its discussion of the Fourteenth Amendment to only one of these grounds—the one concerning discrimination against tenants as contrasted with owner occupants of real property engaged in the same business. At page 56 of their brief in the New York Court of Appeals the appellants stated:

> "In the opinion below, the learned Justice at Special Term mentions (39) three grounds on which it was claimed that the occupancy tax is unconstitutionally discriminatory. It is of interest to note that although he specifically discusses the other two grounds urged in the court below (opinion, 39-41), *he wholly refrains from discussing the sole ground urged here, viz., the discrimination between owner occupied and tenant occupied property.*" (Emphasis ours.)

ARGUMENT

A tax which is applicable to tenants occupying premises for carrying on any business or commercial activity, measured by a percentage of the rent paid for such use or occupancy, does not violate the due process clause or the equal protection clause of the Fourteenth Amendment merely because it is inapplicable to owners of premises who occupy them to carry on similar businesses or commercial activities. Nor are these constitutional provisions violated (a) because the tax law applies a lower rate of tax to tenants whose annual rent is $2,500 or less (b) or because the tax does not apply to residential tenants.

(1)

A tax need not follow a pattern of rigid uniformity. *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U.S. 232, 237 (1890); *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 526-529 (1959). A wide discretion may be exercised in selecting those subject to the tax or in making other classifications. *New York Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573, 578 (1938). It has been said that "in taxation there is a broader power of classification than in some other exercise of legislation." *Citizens' Telephone Co.* v. *Fuller*, 229 U.S. 322, 329 (1913).

(2)

While there appear to be no cases directly in point on the question of the validity of a tax imposed on tenants engaged in commercial activities which does not apply to owners who engaged in such activities on their own prem-

ises, there are closely analogous cases which show that such a tax is constitutional.

In *Singer Sewing Machine Co.* v. *Brickel*, 233 U.S. 304, 315 (1914), a tax was upheld although it applied to the selling of sewing machines from a delivery wagon and was not imposed on those selling such machines at an established place of business. In *Hart Refineries* v. *Harmon*, 278 U.S. 499, 503 (1929), it was held that a tax may be imposed on the sale of a product without taxing the use of the same product.

Manufacturers selling their own products may be excepted from a tax on merchants selling the same products. *Armour & Co.* v. *Virginia*, 246 U.S. 1 (1918). In *Broad River Power Co.* v. *Query*, 288 U.S. 178 (1933), an exemption of industrial plants generating electric power for their own use from a tax on the generation of electricity was sustained. An exemption from a motor vehicle tax may be provided for those vehicles carrying agricultural and dairy products so long as title to the products remains in the producer. *Aero Transit Co.* v. *Georgia Comm'n*, 295 U.S. 285, 290 (1935). Nor is it improper to tax the occupation of refining sugar and molasses although the tax is inapplicable to planters refining their own sugar. *American Sugar Refining Co.* v. *Louisiana*, 179 U.S. 89 (1900).

In light of these and other cases it is evident that the distinction between owners and tenants drawn by the present tax law is not to be deemed capricious. The Legislature may have proceeded on the view that an owner who pays a direct tax on his real property should not also be subjected to this tax. *Klein* v. *Board of Supervisors*, 282 U.S. 19 (1930). Cf. *Alaska* v. *Arctic Maid*, 366 U.S. 199, 204-205 (1961). The appellants anticipated that this might be suggested as one of the reasonable bases for the legislative action, but they make no attempt to meet it squarely. In

stead they confine themselves to an assertion that the appellees conceded in the Court below that the real estate tax is absorbed by the rent paid by tenants and that the economic impact of a real estate tax and a tax on occupancy are identical (Juris. St., pp. 8-9).

This "concession" is based upon page 22 of our brief in the Court of Appeals. In answer we simply quote what we said on that page:

> "We shall assume the economic soundness of this argument. The Courts, however, have consistently refused to accept such an economic argument as a basis for construing constitutional provisions."

Thereafter, we quoted from *Chicago & N.W. Ry. Co.* v. *State*, 128 Wisc. 553, 108 N.W. 557, 562-563 (1906), and *Alabama* v. *King & Boozer*, 314 U.S. 1, 8-9 (1941), and cited *Curry* v. *United States*, 314 U.S. 14, 18 (1941), and *Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495, 499 (1953). We concluded by showing that acceptance of appellees' economic impact theory would lead to bizarre results.

Another valid reason for the distinction drawn between tenants and owners of premises on which they engage in commercial activities may have been the danger that, if the owners were taxed, the law would be held unconstitutional as violative of the New York State constitutional provision limiting the amount to be raised by tax on real estate. The law makers may have feared that a tax on owner-occupants of real estate based on the rental value of the premises occupied would be held to be a tax on real estate even though the tax was confined to those engaged in commercial activities.

The equal protection clause is never violated when the failure to tax a group asserted to be similar to those who are taxed is based on a constitutional bar against taxing

the exempted group. *Union Bank & Trust Co.* v. *Phelps*, 288 U.S. 181, 186-187 (1933); *Packer Corporation* v. *Utah*, 285 U.S. 105, 109-110 (1932). In the case of *Raley & Bros.* v. *Richardson*, 264 U.S. 157 (1924), the Court said (p. 160):

> "It would be a strange application of the equality provision of the Fourteenth Amendment to say that because a State is forbidden by paramount law to impose a tax upon some merchants, it is therefore powerless to impose it upon other merchants to whom the restriction does not apply. It is enough if the State observe the rule of equality among the persons subject to its taxing power."

The appellants urge that these cases are not in point because they relate to an absolute bar against taxation while the State constitutional provision involved merely limits the total amount of tax on real estate. This constitutional limitation, however, could have been as effective a bar against raising revenue by imposing the tax on owner occupants as an absolute prohibition. The appellants' complaint alleged (and the answer admitted) that the real estate tax would amount to $800,331,977 and that the State Constitution limited tax on real estate to an amount which exceeded this sum by only $571,667 (Rec. on App., pp. 23-24). There is no doubt that, if the tax were extended to owner occupants and if the State constitutional limitation were held applicable, the tax law would have been invalidated.

(3)

In *Rast* v. *Van Deman & Lewis*, 240 U.S. 342 (1916), the Court said (p. 357):

> "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that

> state of facts at the time the law was enacted must be assumed. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength."

In *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495 (1937), it was pointed out that when a legislature adopts a tax (p. 510):

> "* * * courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action."

See, also, *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940).

CONCLUSION

The appeal from the judgment of the Court of Appeals of the State of New York should be dismissed.

June 23, 1964.

Respectfully submitted,

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